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## What Can We Expect of Law and Religion in 2020?

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# SMU Law Review Forum

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## WHAT CAN WE EXPECT OF LAW AND RELIGION IN 2020?

Leslie C. Griffin\*

### ABSTRACT

*The United States is in a religion-friendly mood—or at least its three branches of government are. The Supreme Court is turning away from its Free Exercise Clause analysis that currently holds that every religious person must obey the law. At the same time, the Court is rejecting its old Establishment Clause analysis that the government cannot practice or support religion. The old model of separation of church and state is gone, replaced by an ever-growing unity between church and state. This Article examines how much union of church and state this Court might establish.*

### I. THE OLD AND THE NEW

In 1990, the Supreme Court decided an important and controversial case, *Employment Division v. Smith*, ruling that under the Free Exercise Clause, religious people must obey the law.<sup>1</sup> The peyote users in *Smith* were not entitled to a Court-granted exemption from a law banning their unemployment compensation.<sup>2</sup> The old interpretation of the Establishment Clause was also strict on religion. For years, the Court denied aid to religious schools and then gradually allowed only nonreligious aid.<sup>3</sup> *Lemon v. Kurtzman*, which barred government aid to religious schools, is representative of the old interpretation of the Establishment Clause.<sup>4</sup> In the old days, some Justices on the Court defended the separation of church and state as the standard that best protects religious liberty.<sup>5</sup>

*Smith*'s rule has already been weakened by legislative and executive actors and

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1. See *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

2. *Id.* at 890.

3. See Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335, 1357–68 (2016).

4. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

5. See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 13–16 (1947); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 652–55 (1943) (Frankfurter, J., dissenting).

is close to being rejected by the Court itself.<sup>6</sup> The decision in *Smith* allowed legislatures to grant religious exemptions that courts could not.<sup>7</sup> Congress<sup>8</sup> and twenty-one states<sup>9</sup> did just that. Rejecting *Smith*'s standard that every person must obey "neutral law[s] of general applicability,"<sup>10</sup> Religious Freedom Restoration Acts (RFRAs) subjected federal or state laws to strict scrutiny.<sup>11</sup> Under strict scrutiny, governments can substantially burden religion only if acting "in furtherance of a compelling governmental interest" and using the "least restrictive means" to further that interest.<sup>12</sup> People who sought religious exemptions from otherwise illegal conduct won cases under RFRAs that they lost under the Free Exercise Clause. The courts strictly enforced RFRAs, even though they were inconsistent with *Smith*'s reading of free exercise.

Moreover, on denial of certiorari in a recent free speech case, Justice Samuel Alito, joined by Justices Thomas, Gorsuch, and Kavanaugh, argued that the coach-plaintiff's free exercise case was still alive. Alito wrote that in *Smith*, "The Court drastically cut back on the protection provided by the Free Exercise Clause . . . . In this case, however, we have not been asked to revisit" that decision.<sup>13</sup> That request may come soon.<sup>14</sup>

A majority of the Justices have changed the Establishment Clause on a case-by-case basis. The Court now interprets it to allow governmental prayer, permit more aid to religion, and—perhaps in the 2019 Term<sup>15</sup>—give even more aid to religion. Today we stand at the point of asking if this Court, supported by the government's other branches, will continue to expand free exercise and restrict establishment in the coming decade. Both of those moves—to expand the protection of free exercise and to restrict the limits of establishment—favor religious institutions, which have repeatedly won their cases over the past ten years.

There are losers in those cases too. Victories for religion have handed defeats to women, LGBTQs, victims of employment discrimination, some religious

6. See, e.g., *Horvath v. City of Leander*, 946 F.3d 787, 794–95 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("Civil rights leaders and scholars have derided *Employment Division v. Smith* . . . as the '*Dred Scott* of First Amendment law.' At least ten members of the Supreme Court have criticized *Smith*. It is widely panned as contrary to the Free Exercise Clause . . . ." (footnotes and citation omitted)).

7. *Smith*, 494 U.S. at 890.

8. 42 U.S.C. § 2000bb-1 (2018).

9. *State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> [https://perma.cc/JUG2-NNPG].

10. See *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (Stevens, J., concurring)).

11. See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2525 & n.35 (2015).

12. E.g., *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997)).

13. *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., statement respecting denial of certiorari).

14. For contemporaneous criticism of the *Smith* decision, see, e.g., Stephen L. Carter, *The Separation of Church and Self*, 46 SMU L. REV. 585, 597–98 (1993).

15. *Espinoza v. Montana Department of Revenue*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/espinoza-v-montana-department-of-revenue/> [https://perma.cc/6LMT-EXS4] (last visited Nov. 4, 2019).

believers, and many nonbelievers. Since Justice John Paul Stevens retired from the Court in 2010, there has not been a single strict separationist on the Court.<sup>16</sup> The country's pro-religion movement is especially interesting in an age when the fastest growing group in the U.S. population is "Nones," i.e., individuals who do not subscribe to any organized religion. Recent studies show that there are now as many Nones as there are Evangelicals or Catholics.<sup>17</sup> Nones are 23.1%, Evangelicals are 22.5%, and Catholics are 23% of the general population.<sup>18</sup> Increasing victories for religion will limit many civil rights. It is hard to see how the current Court, President, and Congress—and their legal commitments—protect people like Nones, women, LGBTQIs, or victims of employment discrimination.

The following cases explain how the Court, with help from the other branches, has moved away from separation and toward a much closer union of church and state.

## II. PRAYER AND MONUMENTS

Prayer is clearly an exercise of religion, and it seems that a government limited by the Establishment Clause should not practice it. The Court, however, accepted government prayer in a 2014, 5–4 opinion, *Town of Greece v. Galloway*.<sup>19</sup> The town of Greece, New York, almost always began its town board meetings with Christian prayer. Only four of 120 prayers were non-Christian.<sup>20</sup> The Second Circuit ruled the policy governing prayer at town board meetings unconstitutional.<sup>21</sup> However, Justice Anthony Kennedy, writing for the Court, ruled that the prayer was an acceptable government action.<sup>22</sup> Kennedy wrote that prayer serves the important purposes of lending gravity to governmental occasions and reflecting national values.<sup>23</sup> He believed prayer helps legislators reflect on their "shared ideals and common ends."<sup>24</sup> He also rejected the defendant's argument that government prayer should be allowed only if it is nonsectarian. Kennedy found allowing government to edit prayers to be nonsectarian was potentially problematic.<sup>25</sup>

The four dissenters had a different interpretation. Justice Elena Kagan wrote that U.S. law requires equality among religions, meaning that all religions should

16. See Rob Boston, *Justice John Paul Stevens Was a Champion of Church-State Separation*, AMERICANS UNITED FOR SEPARATION OF CHURCH & STATE (July 17, 2019), <https://www.au.org/blogs/wall-of-separation/justice-john-paul-stevens-was-a-champion-of-church-state-separation> [https://perma.cc/8MZD-CPXW].

17. Jack Jenkins, 'Nones' Now as Big as Evangelicals, Catholics in the US, RELIGION NEWS SERV. (Mar. 21, 2019), <https://religionnews.com/2019/03/21/nones-now-as-big-as-evangelicals-catholics-in-the-us/> [https://perma.cc/TFU4-U3AF].

18. *Id.*

19. *Town of Greece v. Galloway*, 572 U.S. 565, 570 (2014).

20. *Id.* at 612 (Breyer, J., dissenting).

21. *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012), *rev'd sub nom.*, 572 U.S. 565 (2014).

22. *Town of Greece*, 572 U.S. at 570 (majority opinion).

23. *See id.* at 582–83.

24. *Id.* at 583.

25. *See id.* at 582.

be represented when the government prays.<sup>26</sup> She upheld the First Amendment's promise that "every citizen, irrespective of her religion, owns an equal share in her government."<sup>27</sup>

Not one Justice took a separationist perspective. No Justice defended the view that government-endorsed prayer is wrong on any set of facts. Kagan herself wrote that she opposed a "bright separationist line."<sup>28</sup> In her opinion, lack of equality among religions was the key, not the presence of government prayer.

Christianity won another legal victory when the Court allowed a forty-foot cross to stand on Maryland-owned property. The Court ruled 7-2 in the 2019 case *American Legion v. American Humanist Ass'n* that the Bladensburg Peace Cross could remain in the middle of a busy intersection.<sup>29</sup> The number of opinions in the case gives a solid idea of how much the Justices disagree about the meaning and application of the Establishment Clause.<sup>30</sup> Several Justices were critical of the Court's old *Lemon* standard. Only Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented.

The two dissenters argued that neutrality is the key standard of the Establishment Clause and that the cross is the "defining symbol" of one religion—Christianity.<sup>31</sup> They argued that Maryland preferred Christianity to other religions, and religion to non-religion, in violation of the Establishment Clause.<sup>32</sup>

That was the losing argument. In contrast, Justice Alito wrote that the cross has taken on a "secular meaning."<sup>33</sup> With a lengthy analysis of the cross's history, he insisted that time had changed the religious symbol to one that everyone can share over its World War I meaning.<sup>34</sup> He was very critical of *Lemon*, whose days appear to be numbered.<sup>35</sup> Justice Kagan disagreed with him on that point, arguing *Lemon* can still work.<sup>36</sup> As she did in *Town of Greece*, Justice Kagan praised religious pluralism in American society and also lauded Alito's analysis for contributing to that viewpoint.<sup>37</sup>

Justice Stephen Breyer concurred that the cross posed no threat to establishment.<sup>38</sup> Justice Gorsuch, joined by Justice Thomas, concluded the challengers did not have standing.<sup>39</sup> Justice Thomas, alone, added his distinctive position that the Establishment Clause should not have been incorporated (i.e., applied to the states).<sup>40</sup> He also wrote that because Maryland had not coerced

26. *Id.* at 616 (Kagan, J., dissenting).

27. *Id.*

28. *Id.*

29. *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2089 (2019).

30. Seven of nine Justices authored opinions in some form. *See id.* at 2067.

31. *See id.* at 2107 (Ginsburg, J., dissenting) (internal quotation marks omitted) (quoting ROBIN M. JENSEN, *THE CROSS: HISTORY, ART, AND CONTROVERSY*, at ix (2017)).

32. *Id.* at 2106.

33. *Id.* at 2089 (majority opinion).

34. *See id.*

35. *See id.* at 2080–81 (plurality opinion).

36. *See id.* at 2094 (Kagan, J., concurring).

37. *See id.*

38. *Id.* at 2091 (Breyer, J., concurring).

39. *Id.* at 2098 (Gorsuch, J., concurring).

40. *Id.* at 2095 (Thomas, J., concurring). *See generally* Frederick Mark Gedicks, *Incorporation of*

anyone, it had not violated the Establishment Clause.<sup>41</sup> Justice Kavanaugh criticized *Lemon* and noted several options Maryland has in the future as to keeping or not keeping the cross.<sup>42</sup> His opinion is a reminder that legislators and governors have a role to play in religious liberty.<sup>43</sup>

The diverse opinions should remind everyone that the meaning of the Establishment Clause is in play. In both *Town of Greece* and *American Legion*, Christians won at the Supreme Court by persuading Justices that their very religious symbols and actions were really secular.

### III. RFRAS, WOMEN, AND LGBTQIS

The Supreme Court held in *Burwell v. Hobby Lobby Stores, Inc.*, a contraception case, that the federal RFRA limited women's rights.<sup>44</sup> The Affordable Care Act aimed to make healthcare, including contraceptive coverage, available to all Americans. Religious businesses, however, argued that they were morally opposed to contraception and would not provide coverage for their employees.<sup>45</sup> Justice Alito concluded that the businesses won under RFRA because they faced a substantial burden that was not the least restrictive means of satisfying the government's interests.<sup>46</sup> Businesses could notify the government that they would not follow the law, and the government would make sure women had some kind of access to contraception.<sup>47</sup> The Court ruled that the same exemption should apply to nonprofit and for-profit businesses.<sup>48</sup>

Justice Ginsburg's dissent explained that the ruling was inconsistent with *Smith*. The religious groups repeatedly lost under the First Amendment but won under RFRA.<sup>49</sup> The dissent also claimed that RFRA should not be used to limit third-party rights—in this case, women's rights.<sup>50</sup>

*Hobby Lobby* opened the door to more claims of conscience. In *Zubik v. Burwell*, the Little Sisters of the Poor and other religious organizations argued that filling out a form stating they would provide contraception violated their religion.<sup>51</sup> A 4–4 split Court did not decide that question—it issued an opinion ordering the parties to find a solution.<sup>52</sup>

Post-*Zubik*, the transition from President Obama to President Trump gave conscience even more support. The Department of Health and Human Services (HHS) issued Religious and Moral Interim Final Rules (IRFs), which allow

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the Establishment Clause Against the States: A Logical, Textual, and Historical Account, 88 IND. L.J. 669 (2013) (examining the debate regarding the Establishment Clause's incorporation).

41. *Am. Legion*, 139 S. Ct. at 2096.

42. *Id.* at 2093–94 (Kavanaugh, J., concurring).

43. *See id.*

44. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690–91 (2014).

45. *See id.* at 701–02.

46. *See id.* at 691.

47. *Id.* at 730–31.

48. *See id.* at 692.

49. *Id.* at 747 (Ginsburg, J., dissenting).

50. *See id.* at 744–46.

51. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016) (per curiam).

52. *Id.* at 1560.

religious believers, as well as nonprofits, small businesses, or individuals with moral convictions, to not provide insurance covering contraception.<sup>53</sup> The rules also lifted the requirement to notify the government of their decision.<sup>54</sup>

HHS also promulgated a rule that allows healthcare providers to deny patients healthcare based on the providers' conscience beliefs.<sup>55</sup> Some states have filed lawsuits arguing that the threatened loss of federal funding—if conscience is not protected—imperils the care of women, LGBTQIs, and other vulnerable individuals.<sup>56</sup> Some providers worry that provision of vaccines, physician-assisted suicide, and abortion is threatened.<sup>57</sup> The Court will revisit these issues soon; it granted certiorari in two cases addressing employers' right to opt out of contraceptive coverage. Pennsylvania and New Jersey are challenging the government's expansion of the exemption, and the Little Sisters of the Poor are defending their standing to support and receive the exemption.<sup>58</sup>

Another new government rule limits Title X funding for those that provide or refer individuals to "programs where abortion is a method of family planning,"<sup>59</sup> including Planned Parenthood.<sup>60</sup> It is clear that the current Administration's agencies are emphasizing religion first, not healthcare. They want the healthcare provider's conscience to defeat the patient's medical needs.

Despite their victory on the constitutionality of same-sex marriage, LGBTQIs continue to face limits on their rights. In 2015, a 5–4 Court in *Obergefell v. Hodges* ruled that the Constitution protects same-sex marriage.<sup>61</sup> In his opinion for the Court, Justice Kennedy (joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan) wrote that state bans on same-sex marriage violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>62</sup> The Due Process Clause protects a fundamental right to marriage, and the Equal Protection Clause

53. U.S. DEP'T OF HEALTH & HUMAN SERVS., FACT SHEET: FINAL RULES ON RELIGIOUS AND MORAL EXEMPTIONS AND ACCOMMODATION FOR COVERAGE OF CERTAIN PREVENTATIVE SERVICES UNDER THE AFFORDABLE CARE ACT (2018), <https://www.hhs.gov/about/news/2018/11/07/fact-sheet-final-rules-on-religious-and-moral-exemptions-and-accommodation-for-coverage-of-certain-preventive-services-under-affordable-care-act.html> [https://perma.cc/D72L-V4HV].

54. *Id.*

55. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (July 22, 2019) (to be codified at 45 C.F.R. pt. 88.1).

56. Jonathan Stempel, *U.S. States, Cities Sue to Block Trump 'Conscience' Rule for Healthcare Workers*, REUTERS (May 21, 2019, 3:29 PM), <https://www.reuters.com/article/us-usa-healthcare-religion-lawsuit/us-states-cities-sue-to-block-trump-conscience-rule-for-healthcare-workers-idUSKCN1SR2DV> [https://perma.cc/X3VP-L6HP].

57. *Id.*

58. See *Pennsylvania v. President U.S.*, 930 F.3d 543 (3d Cir. 2019), *cert. granted sub nom.* Little Sisters of Poor v. Pennsylvania, 140 S. Ct. 918 (2020) (mem.), and *cert. granted sub nom.* Trump v. Pennsylvania, 140 S. Ct. 918 (2020) (mem.).

59. Compliance With Statutory Program Integrity Requirements, 84 Fed. Reg. 7714, 7788 (Mar. 4, 2019) (to be codified at 42 C.F.R. pt. 59).

60. See News Release, U.S. Dep't of Health & Human Servs., HHS Releases Final Title X Rule Detailing Family Planning Grant Program (Feb. 22, 2019), <https://www.hhs.gov/about/news/2019/02/22/hhs-releases-final-title-x-rule-detailing-family-planning-grant-program.html> [https://perma.cc/S3R9-WFYH].

61. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

62. *Id.* at 2604–05.

requires that heterosexual and same-sex marriages be treated equally.<sup>63</sup>

In contrast to the Court's unanimous ruling on interracial marriage,<sup>64</sup> *Obergefell* had four dissents. The dissenting Justices primarily worried about the opinion's effect on religious people. Chief Justice Roberts argued, "[P]eople of faith can take no comfort in the treatment they receive from the majority today."<sup>65</sup> Justice Thomas, joined by Justice Scalia, concluded that "the majority's decision threatens the religious liberty our Nation has long sought to protect."<sup>66</sup> And Justice Alito argued that religious people "will risk being labeled as bigots" and marginalized by the majority's argument.<sup>67</sup>

The effect of religious law on LGBTQIs quickly became obvious in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*. The Court ruled 7-2 to allow a baker to refuse to bake a wedding cake for a same-sex couple even though discrimination against gays and lesbians violated Colorado state law.<sup>68</sup> The free exercise ruling seemed surprising because antidiscrimination laws are neutral laws of general applicability. In this case, however, Justice Kennedy concluded that the Colorado commission had violated *Smith* by demonstrating "clear and impermissible hostility" toward the baker's religion.<sup>69</sup> Kennedy described a commissioner who said:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>70</sup>

Kennedy explained that the situation became even worse because the legal record showed no objection from other commissioners to these statements, the state court decisions did not mention them, and the commission never disavowed them.<sup>71</sup>

That commissioner's statement was sad *but true*. The Establishment Clause exists because the Founders recognized the harms that religion did to individuals in the past and would do in the present and the future if allowed to.<sup>72</sup> The commissioner's honest statement conveys the concern that underlies the Religion

63. *Id.*

64. See *Loving v. Virginia*, 388 U.S. 1 (1967).

65. *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

66. *Id.* at 2638 (Thomas, J., dissenting).

67. *Id.* at 2643 (Alito, J., dissenting).

68. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723-24 (2018).

69. *Id.* at 1729.

70. *Id.* (internal quotation marks omitted) (quoting Transcript of Colorado Civil Rights Meeting at 11-12, *Craig v. Masterpiece Cakeshop, Inc.* (July 25, 2014) (No. P20130008X, CR2013-0008)).

71. *Id.* at 1729-30.

72. See, e.g., Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1604-10 (1989).



Clauses, which are not supposed to express an uncritical approach toward religion. Nonetheless, stating the accurate role of religion in history and society became firm evidence of a free exercise violation in the minds of the majority of Justices.

Justice Ginsburg's dissent, which was joined only by Justice Sotomayor, concluded that statements made by one or two members of a four person decision-making group did not justify reversal of the court of appeals's decision.<sup>73</sup> Moreover, the two Justices saw no reason "why the comments of one or two commissioners should be taken to overcome Phillips's refusal to sell a wedding cake to Craig and Mullins."<sup>74</sup> The dissent also noted that the majority did not identify what "prejudice infected" the decision-makers.<sup>75</sup>

Thus, *Masterpiece* is yet another pro-religion decision. There are others. Pre-*Masterpiece*, the Court opened the door to allowing all kinds of employment discrimination by religious organizations—not only churches, but schools, universities, and hospitals.

#### IV. HOSANNA-TABOR AND DISCRIMINATION<sup>76</sup>

Federal and state laws protect workers in numerous ways. Employees are supposed to benefit from the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), Title VII, the Pregnancy Discrimination Act, the Equal Pay Act, the Fair Labor Standards Act, the Family & Medical Leave Act, workers' compensation laws, and numerous state tort and contract laws. The statutes usually allow employees to sue employers for violations of the identified rights.

Most courts, however, have ruled that lawsuits by ministers must be dismissed. The Fifth Circuit created this "ministerial exception" in 1972 when it dismissed Mrs. Billie McClure's equal pay lawsuit against the Salvation Army.<sup>77</sup> After that, "federal and state courts repeatedly expanded the exception to reject lawsuits by elementary and secondary school teachers, school principals, university professors, music teachers, choir directors, organists, administrators, administrative secretaries, communications managers, and public relations personnel alleging violations" of the statutes.<sup>78</sup> In 2012, in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, the Supreme Court recognized the ministerial exception for the first time as an affirmative defense required by the Religion Clauses of the First Amendment.<sup>79</sup>

Cheryl Perich was an elementary school teacher at Hosanna-Tabor Evangelical

73. *Masterpiece Cakeshop*, 138 S. Ct. at 1751 (Ginsburg, J., dissenting).

74. *Id.*

75. *Id.*

76. Portions of this section draw from a previously written article. See Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981 (2013).

77. See *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972).

78. Griffin, *supra* note 76, at 982.

79. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-89 (2012); see Note, *Of Priests, Pupils, and Procedure: The Ministerial Exception as a Cause of Action for On-Campus Student Ministries*, 133 HARV. L. REV. 599, 599 (2019).

Lutheran Church and School, a K-8 school in Redford, Michigan. The school's personnel manuals stated that she, like any other schoolteacher, was protected by employment discrimination laws.<sup>80</sup> As the school year approached, Perich suddenly and unexpectedly became ill. When she tried to return to class from disability leave, the school suggested that she voluntarily resign.<sup>81</sup> Perich refused and was fired after she threatened to talk to the Equal Employment Opportunity Commission (EEOC) about a disabilities discrimination lawsuit.<sup>82</sup> She then sued Hosanna-Tabor under the anti-retaliation provisions of the ADA.<sup>83</sup>

The Supreme Court unanimously denied Perich her day in court, believing they were strongly protecting religious freedom by ruling that the First Amendment requires a ministerial exception to employment laws.<sup>84</sup> The ministerial exception is "a court-created doctrine holding that the First Amendment requires the dismissal of many employment discrimination cases against religious employers, even when the antidiscrimination statutes authorize litigation."<sup>85</sup> *Smith* did not apply to ministers.<sup>86</sup>

Many employees continue to lose their cases post-*Hosanna-Tabor*. For example, the Second Circuit decided a female principal at a Catholic high school was a "minister."<sup>87</sup> The Seventh Circuit concluded a Jewish teacher who taught Hebrew and Jewish studies at a Jewish school was a "minister."<sup>88</sup> In contrast, the Ninth Circuit ruled that Kristen Biel, a "Grade 5 Teacher" at St. James Catholic School, could proceed with a disabilities claim against her employer after it fired her for wanting to take time off to receive treatment for breast cancer.<sup>89</sup> The Ninth Circuit also reversed a district court opinion that had concluded teacher Agnes Deirdre Morrissey-Berru was a "minister."<sup>90</sup> The Supreme Court granted certiorari in these Ninth Circuit cases, and everyone is wondering if the Court will expand the ministerial exception and decide that Biel and Morrissey-Berru, too, are ministers.<sup>91</sup>

Justices and advocates argued the exception protects religious liberty by taking churches outside the law. However, real ministers who are financially and legally

80. EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 782 (6th Cir. 2010), *rev'd sub nom.*, 565 U.S. 171 (2012).

81. *Hosanna-Tabor*, 565 U.S. at 178-79.

82. *Id.* at 179.

83. *Id.*

84. *Id.* at 190.

85. Griffin, *supra* note 76, at 982.

86. See Thomas C. Berg et al., *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. U. L. REV. COLLOQUIY 175, 189 n.70 (2011).

87. *Fratello v. Archdiocese of New York*, 863 F.3d 190, 210 (2d Cir. 2017).

88. *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018) (*per curiam*).

89. *Biel v. St. James Sch.*, 911 F.3d 603, 610-11 (9th Cir. 2018), *cert. granted sub nom.*, 140 S. Ct. 680 (2019) (*mem.*).

90. *Morrissey-Berru v. Our Lady of Guadalupe Sch.*, 769 Fed. App'x 460, 461 (9th Cir. 2019), *cert. granted sub nom.*, 140 S. Ct. 679 (2019) (*mem.*).

91. See Adam Liptak, *Supreme Court to Rule on Exception to Work Bias Laws for Religious Schools*, N.Y. TIMES (Dec. 18, 2019), <https://www.nytimes.com/2019/12/18/us/supreme-court-discrimination-religious-schools.html> [https://perma.cc/8ETZ-PGKX].

harmed by their bosses have no day in court.<sup>92</sup> Pregnant ministers do not get a day in court to protect them against discrimination on the basis of their pregnancies.<sup>93</sup> Moreover, many women who know they are not their church's ministers become "ministers" the day they file a lawsuit.<sup>94</sup> The rule applies to many religious organizations, including schools like Hosanna-Tabor, that pretend to follow antidiscrimination laws but abandon them whenever they can claim someone is a minister.

The Court is also starting to move towards the position that states must provide aid equally to religious and nonreligious actors.

## V. MONEY

In the nineteenth century, Congressman James Blaine tried to convince the United States to adopt a constitutional amendment banning government funding for religious institutions, including schools.<sup>95</sup> The federal amendment never passed.<sup>96</sup> Almost forty states, however, passed "Blaine Amendments" to their own constitutions that barred the funding of religion.<sup>97</sup> Since then, Americans have debated whether the amendments are pro-religious freedom or discriminatory against religious institutions.<sup>98</sup>

Missouri has a state constitutional ban on funding for religious entities.<sup>99</sup> Missouri offered a "Scrap Tire Program" that reimbursed entities that made their playgrounds out of recycled tires.<sup>100</sup> Trinity Lutheran Church Child Learning Center applied for funding, and the State refused funding because of the State's constitutional ban.<sup>101</sup> Trinity Lutheran brought suit against the State and appealed their losses in the lower courts to the U.S. Supreme Court.

Seven of nine Supreme Court Justices sided with Trinity Lutheran in *Trinity Lutheran Church of Columbia v. Comer*.<sup>102</sup> The Court ruled that Missouri's decision to deny state funding to Trinity Lutheran for its playground violated the Free Exercise Clause.<sup>103</sup> Roberts's opinion for the Court stated quite straightforwardly that to deny funding simply because an institution is a church violates free exercise and is "odious to our Constitution."<sup>104</sup> The State's rule was simple—he wrote: "No

92. See, e.g., *Melhorn v. Balt. Washington Conference of the United Methodist Church*, No. 2065, 2016 WL 1065884, at \*6 (Md. Ct. Spec. App. Mar. 16, 2016), *cert. denied*, 137 S. Ct. 377 (2016).

93. See Griffin, *supra* note 76, at 991.

94. See *id.* at 1007.

95. Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 556 (2003).

96. *Id.* at 573.

97. *Id.*

98. See, e.g., Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 131-40 (2000).

99. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2018 (2017) (citing MO. CONST. art. I, § 7).

100. *Id.* at 2017.

101. *Id.* at 2018.

102. *Id.* at 2016.

103. *Id.* at 2024.

104. *Id.* at 2025.

churches need apply.”<sup>105</sup> That rule was unconstitutional.

Justices Clarence Thomas and Neil Gorsuch concurred separately. Gorsuch described the case simply as “discrimination against religious exercise.”<sup>106</sup> Both men distanced themselves from Roberts’s footnote three, which offered a possible (although unlikely) limit on the extent of the opinion.<sup>107</sup> According to the footnote, “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.”<sup>108</sup> Apparently the two Justices were ready to avoid any limits on the future power of free exercise to aid religion.

Justice Breyer also wrote a concurrence to the judgment. He compared *Trinity Lutheran* to text from *Everson*, a school-funding case, which mentioned that churches should not be cut off from police and fire protection.<sup>109</sup> He concluded that property aid and police protection are the same.<sup>110</sup>

Justice Sonia Sotomayor’s dissent, joined only by Justice Ginsburg, was much more complicated, detailed, and historical. She repeatedly used piercing language to identify the dangerous simplicities of the majority’s opinion. Even in her opening paragraph, she insisted that the decision “slights both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both.”<sup>111</sup> Only the two dissenting Justices recognized that establishment separation protects religious liberty by blocking the government from funding any religion that desires money. In their minds, the majority’s establishment-free reasoning was a “startling departure from our precedents.”<sup>112</sup> At the end of her opinion, Sotomayor concluded the Court was going “to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.”<sup>113</sup>

Justice Sotomayor’s footnote fourteen worried about what the decision “might enable tomorrow.”<sup>114</sup> Footnotes three and fourteen set up the future debate.

The Court granted certiorari on that debate in a case about school funding, *Espinoza v. Montana Department of Revenue*.<sup>115</sup> Montana parents asked the Court to resolve the question of whether “the government may bar religious options from otherwise neutral and generally available student-aid programs.”<sup>116</sup>

Montana has a very strong anti-church funding provision in its Constitution.<sup>117</sup> Montana’s legislature enacted tax credits for people’s donations to student

105. *Id.* at 2024.

106. *Id.* at 2026 (Gorsuch, J., concurring).

107. *See id.* at 2025 (Thomas, J., concurring); *id.* at 2026 (Gorsuch, J., concurring).

108. *Id.* at 2024 n.3 (plurality opinion).

109. *Id.* at 2027 (Breyer, J., concurring) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)).

110. *Id.*

111. *Id.* (Sotomayor, J., dissenting).

112. *Id.* at 2028.

113. *Id.* at 2041.

114. *Id.* at 2041 n.14.

115. *See Espinoza v. Montana Department of Revenue*, *supra* note 15.

116. Petition for Writ of Certiorari at 15, *Espinoza v. Mont. Dep’t of Revenue*, 139 S. Ct. 2777 (2019) (No. 18-1195), 2019 WL 1220945, at \*15.

117. *See id.* at 11–13 (citing MONT. CONST. art. X, § 6).

scholarship organizations, which give scholarships to students who attend private schools that are Qualified Education Providers (QEPs).<sup>118</sup> Under the legislature's plan, religious schools are QEPs.<sup>119</sup> However, the state's Department of Revenue, which manages the program, concluded that the legislature's rule violated the Montana Constitution.<sup>120</sup> Accordingly, the Department of Revenue passed Rule 1, which holds that religious schools cannot be QEPs.<sup>121</sup> The Montana Supreme Court determined that the rule was unnecessary because the underlying tax credit program violated the Montana Constitution.<sup>122</sup>

Now, in *Espinoza*, the Supreme Court will answer the question of whether states may constitutionally exclude religious students from state aid.<sup>123</sup> A majority of the Court appears ready to answer "no." Post-oral argument, however, everyone is wondering if Chief Justice Roberts may turn the case toward a Montana victory, perhaps joining Justice Ginsburg, who questioned whether the petitioners really had standing to pursue their case.<sup>124</sup>

## VI. THE DEATH PENALTY AND CHILD ABUSE

Disagreements over the Establishment Clause were also evident in two recent death penalty cases. A Muslim prisoner, Dominique Ray, asked that his imam be present in his execution chamber, just as Christian ministers always have been.<sup>125</sup> Five Justices (Roberts, Thomas, Alito, Gorsuch, and Kavanaugh) denied his claim, while four Justices (Ginsburg, Breyer, Sotomayor, and Kagan) joined in dissent.<sup>126</sup> Ray's death penalty proceeded without stay because the majority thought prompt timing is of top priority in death penalty cases.<sup>127</sup> Justice Kagan's dissent argued that the "clearest command of the Establishment Clause"<sup>128</sup>—not preferring one religion to another—had been violated.

In contrast, a Buddhist prisoner received a stay in *Murphy v. Collier*.<sup>129</sup> This time, Chief Justice Roberts and Justice Kavanaugh concurred with the four *Ray*

118. *Id.* at 5–6.

119. *See id.* at 6–7.

120. *See id.*

121. *Id.*

122. *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603, 614 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019) (mem.).

123. Petition for Writ of Certiorari, *supra* note 116, at 1.

124. *See* Transcript of Oral Argument, *Espinoza*, 139 S. Ct. 2777 (No. 18-1195), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2019/18-1195\\_g314.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-1195_g314.pdf) [<https://perma.cc/RB2W-L7C6>]; *see also, e.g.*, Andrew Chung, *Roberts Pivotal as U.S. Supreme Court Tackles Public Aid to Religious Schools*, REUTERS (Jan. 22, 2020, 5:13 AM), <https://www.reuters.com/article/us-usa-court-religion/roberts-pivotal-as-us-supreme-court-tackles-public-aid-to-religious-schools-idUSKBN1ZL1CA> [<https://perma.cc/GU2G-PRNE>]; Amy Howe, *Argument Analysis: Justices Divided in Montana School-Choice Case*, SCOTUSBLOG (Jan. 22, 2020, 2:31 PM), <https://www.scotusblog.com/2020/01/argument-analysis-justices-divided-in-montana-school-choice-case/> [<https://perma.cc/U6DZ-M3CN>].

125. *See Dunn v. Ray*, 139 S. Ct. 661, 661 (2019) (mem.).

126. *Id.*

127. *Id.*

128. *Id.* (Kagan, J., dissenting from denial of application to vacate stay) (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)).

129. 139 S. Ct. 1475, 1475 (2019) (mem.).

dissenters. Justices Alito, Thomas, and Gorsuch, however, continued to emphasize the need for death penalty cases to proceed in a timely manner.<sup>130</sup> The majority left it open for Texas to decide what to do next. Texas immediately passed a rule saying no ministers of any faith can be present in the execution room.<sup>131</sup>

On another subject, the Supreme Court has not issued a notable child abuse/religion opinion in the last ten years. However, in this area, *Smith* has continued to do a good job. *Smith* opened the courts for the government to pursue abusers, claiming that pre-*Smith*, Free Exercise Clause cases kept the courts closed to churches and allowed churches to keep their abusers' records secret from police and legal oversight. *Smith* broke the hold of the abusers on the courts—because all religious personnel were expected to obey the law.

The movie about the Boston Catholic abuse scandal, *Spotlight*, won the 2016 Academy Award for Best Picture.<sup>132</sup> The movie was part of a strong trend to finally hold the abusers accountable. States began deeper investigations into the long-hidden identity of the abusers. Pennsylvania set an example for other states by investigating misconduct in their own Catholic dioceses.<sup>133</sup> States, finally joined by New York, have also opened their courts to abused children by extending the statutes of limitations so that victims can have their injuries addressed by the courts.<sup>134</sup> Courts are starting to recognize that victims remember abuse at all times of their lives, long past the limits of the old, shorter statutes of limitations.<sup>135</sup>

## VII. WHAT COMES NEXT?

These cases explain how the Court is currently expanding the Free Exercise Clause and limiting the Establishment Clause. It is possible that, during the 2019 Term, the Free Exercise Clause and the Establishment Clause will expand even more protection for religious freedom. *Smith* may be rejected, and *Espinoza* could change state funding of religion.

### A. WHAT WOULD HAPPEN IF THE COURT WERE MOVING IN THE OPPOSITE

130. See *id.* at 1478, 1480 (Alito, J., dissenting from grant of application for stay).

131. Jolie McCullough & Elizabeth Byrne, *Texas Bans Chaplains from Its Execution Chamber*, TEX. TRIBUNE (Apr. 3, 2019, 2:00 PM), <https://www.texastribune.org/2019/04/03/texas-ban-chaplains-execution-chamber-death-row/> [https://perma.cc/D7DR-U3L2].

132. SPOTLIGHT (Participant Media et al. 2015); see Maquita Peters, 'Spotlight' Wins Best Picture at 2016 Academy Awards, NAT'L PUB. RADIO (Feb. 28, 2016, 7:14 PM), <https://www.npr.org/sections/thetwo-way/2016/02/28/467958874/oscars-2016-follow-along-with-nprs-live-blog> [https://perma.cc/8UW2-T4YQ].

133. See OFFICE OF ATTORNEY GEN., COMMONWEALTH OF PA., PENNSYLVANIA DIOCESE VICTIMS REPORT (2018), [https://www.attorneygeneral.gov/wp-content/uploads/2018/08/A-Report-of-the-Fortieth-Statewide-Investigating-Grand-Jury\\_Cleland-Redactions-8-12-08\\_Redacted.pdf](https://www.attorneygeneral.gov/wp-content/uploads/2018/08/A-Report-of-the-Fortieth-Statewide-Investigating-Grand-Jury_Cleland-Redactions-8-12-08_Redacted.pdf) [https://perma.cc/K4C4-TELG].

134. See Augusta Anthony, *New York Passes Child Victims Act, Allowing Child Sex Abuse Survivors to Sue Their Abusers*, CNN (Jan. 29, 2019, 3:46 PM), <https://edition.cnn.com/2019/01/28/us/new-york-child-victims-act/index.html> [https://perma.cc/9PFK-WXNZ].

135. See, e.g., August Piper et al., *What's Wrong with Believing in Repression?*, 14 PSYCHOL., PUB. POL'Y, & L. 223, 227–29 (2008); see also Rick Rojas, *He Says a Priest Abused Him. 50 Years Later, He Can Now Sue.*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/nyregion/child-victims-act-lawsuit.html> [https://perma.cc/4YJG-N9R9].

## DIRECTION?

Free exercise would require everyone to follow the law. Child abusers would be arrested and held liable for their crimes and torts. Abused children could get into court. Every employer would make full health insurance coverage available to employees. Everyone would obey the antidiscrimination laws. Businesses would serve everyone without discriminating. Discrimination cases would go to court, where either side could win based on the facts of that specific case. If discrimination occurred, the plaintiff wins. If a purely religious decision was made, the employer wins. Judges and juries can tell the difference.

Every prisoner of any religion would have his or her choice of religious support available at execution. Unlike contraception or discrimination, having a minister by one's side at death really is the practice of religion and should be protected equally—for people of all religions, or none.

Congress and the states would realize that RFRA primarily allow religious people to discriminate and would take them out of the law. Instead, *Lukumi*, the case that holds that discrimination on religious grounds violates the Free Exercise Clause, would protect everyone from religious discrimination.<sup>136</sup>

The Establishment Clause would restrict government prayer and monuments. Christianity would not get the upper hand in either area. Moreover, government money—tax money taken from all citizens—would not support religion, which is not shared by all members of the country. Some people's tax money is not supposed to support the religion of others. That is a fundamental constitutional principle that needs to be relearned.

Some readers of this Article may think that my proposals sound anti-religious. They are not. Instead, they are pro-religious liberty and yet do not allow some religions to get what they want. This is what the Founders desired. They recognized that religions have done harmful things and therefore restricted relationships between church and state to avoid harm to everyone.

This Court needs to relearn the Founders' lesson. Everyone should follow the law. Governments should neither tax nor favor religion. This is what the Constitution—framed by brilliant, pro-separation founders like James Madison and Thomas Jefferson—is supposed to do.

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136. See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993).